



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**CAUSE NO. 324 A OF 2015**

**BENARD OGOLLA OTIENO**

**CLAIMANT**

**v**

**COMPLY INDUSTRIES LIMITED**

**RESPONDENT**

**JUDGMENT**

1. Benard Ogolla Otieno (Claimant) instituted legal proceedings against Comply Industries Ltd (Respondent) on 28 October 2015 alleging breach of contract/unfair termination of employment.
2. On 20 January 2016, the Court directed the Respondent to file a Response, witness statements and documents before 29 January 2016.
3. Come 11 February 2016 when the Cause was mentioned to confirm compliance, no Response had been filed. The Court allowed the Respondent up to 17 February 2016 to file the Response and statements but again the Respondent did not comply.
4. The Court again extended the time for the Respondent to file its documents before 31 May 2016. There was no compliance yet again.
5. On 2 March 2017, the Court declined yet another attempt by the Respondent to have the Response filed as no sufficient or reasonable grounds were given for not filing within timelines earlier given. The Court scheduled the hearing for 19 July 2017.
6. The Respondent still went ahead to file its Response on 19 July 2017, the morning of the hearing and applied to have the same admitted. The Court declined for reasons which are on record.
7. The Claimant gave sworn testimony and was cross examined.
8. The Respondent filed its written submissions on 20 September 2017 while the Claimant's submissions were not on record by this morning.
9. The Court has considered the material placed before it and identified the Issues for determination as, *whether the termination of the Claimant's contract was unfair, whether the Claimant was underpaid, whether Claimant had accrued leave at time of separation and appropriate remedies.*

**Unfairness**

**Procedural fairness**

10. The Claimant's testimony was that he worked normally up to 1 August 2015 when one of the Respondent's managers called Indraj informed him that his services were no longer required without assigning any reasons. Attempts to get clarifications from the Personnel Office were not successful.

11. The Claimant stated that there was no hearing before the dismissal.

12. The Respondent contended in its written submissions that the Claimant deserted work and when asked to explain the absence, he absconded again, to resurface with Court documents.

13. If the position advanced by the Respondent was correct, then it had a valid and fair reason to dismiss the Claimant, but after following a process as contemplated by the law.

14. Pursuant to section 41 of the Employment Act, 2007, an employer is obligated to conduct a hearing if it is contemplating terminating an employment contract on the grounds of *misconduct, poor performance or physical incapacity*.

15. The Respondent did not confront the Claimant during cross examination with particulars of a hearing or when such hearing took place.

16. The Court can therefore infer and conclude that the Claimant's employment was terminated unfairly.

### **Underpayments**

17. The Claimant pleaded that he was a Milling Machine Operator and that he was underpaid from February 2013 to August 2015. He cited Legal Notices No. 97 of 2012 and No. 197 of 2013.

18. During testimony he stated that the wages he was earning over the period, and that he was underpaid by a total of Kshs 84,289/20.

19. The testimony was not controverted/challenged and the Court finds the head of claim proved.

### **Accrued leave**

20. The Claimant also testified that he did not go on leave for the period he was in employment.

21. With the testimony on record, the Court finds for the Claimant as claimed in the sum of Kshs 18,081/45.

22. Before discussing appropriate remedies, the Court wishes to note that this particular Respondent/employer has not shown the diligence expected of a litigant and many are the Causes it has failed or declined to file Responses in time or as directed by the Court, case in point being Nakuru Cause No. 214 of 2014, *Alvin Masiemo John v Comply Industries Ltd* (judgment delivered today).

### **Appropriate remedies**

#### **Compensation**

23. The Claimant served the Respondent for about 3 years and in consideration of the length of service and the conduct of the Respondent, the Court is of the view that the equivalent of 6 months wages would be appropriate (salary at time of separation was stated as Kshs 12,864/- average as Claimant was on a daily wage paid weekly).

#### **Accrued leave**

24. The Claimant's testimony that he did not go on annual leave for 2 years and 7 months was not challenged or controverted. He pleaded the amount as Kshs 18,081/45 and the Court will allow the same.

### **Pay in lieu of notice**

25. The Claimant was paid on a daily rate equivalent to a monthly wage of Kshs 12,864/- the Court would award him as much.

### **Underpayments**

26. The Court would allow the claim for underpayments in the sum of Kshs 84,289/20.

### **Conclusion and Orders**

27. The Court finds and holds that the termination of the Claimant's contract of employment was unfair and awards him and orders the Respondent to pay him

(a) Compensation	Kshs 77,184/-
(b) Accrued leave	Kshs 18,081/-
(c) Pay in lieu of notice	Kshs 12,864/-
(d) Underpayments	Kshs 84,289/-
<b>TOTAL</b>	<b>Kshs 192,418/-</b>

28. The Claimant denied costs for failure to file/serve submissions

**Delivered, dated and signed in Nakuru on this 17<sup>th</sup> day of November 2017.**

**Radido Stephen**

**Judge**

### **Appearances**

For Claimant	Ms. Chepngetich instructed by Wambeyi Makomere & Co. Advocates
For Respondent	Ms. Kerubo instructed by Tombe & Co. Advocates
Court Assistants	Nixon/Martin